

Office of
The City Attorney
City of San Diego

MEMORANDUM
MS 59

(619) 236-6220

DATE: July 30, 2007
TO: Honorable Mayor and City Council Members
FROM: City Attorney
SUBJECT: Rescission of Resolution R-297335

INTRODUCTION

On November 18, 2002 the City Council passed Resolution R-297335, which provided for the City to defend and indemnify present and future San Diego City Employees' Retirement System ("SDCERS") Board members for claims or lawsuits arising from any act or omission in the scope of their duties as a board member, including the payment of judgments for punitive or exemplary damages where the San Diego City Council makes certain findings.¹ That City Council action granted SDCERS Board Members complete and total indemnity, including indemnity for criminal acts. Since then, several SDCERS board members have requested that the City pay their defense costs in lawsuits filed against them on behalf of the City. The City Council did not approve the payment requests, so a lawsuit was filed entitled *Torres v. City of San Diego*, San Diego Superior Court case number GIC 852293. In fact, with criminal cases still outstanding, any board member who is convicted would face fines and penalties. As it stands now, the Board Members could use R-297335 as a basis to demand that the City pay the fines and penalties assessed them.

On January 20, 2006, the court in *Torres* found that the board members were entitled to a defense based on the resolution providing indemnity. On March 7, 2006, the City Council voted 4-2 in favor of rescinding the resolution providing indemnity. Since five votes were required to pass the resolution, the 2002 resolution, R-297335, remains in effect.

¹ Exhibit 1, Resolution R-297335.

The City appealed the trial court's decision. On July 25, 2007 the Fourth District Court of Appeals upheld the trial court's decision in the *Torres* case and applied R-297335 to find that, since the City Council did not make a finding of wrongdoing, the City must pay attorneys fees and costs incurred by members of SDCERS who have committed wrongdoing against the taxpayers of the City of San Diego.²

The issue now is whether taxpayers should be forced to pay the wrongdoers' attorney bills even when the wrongdoers directly breach their duty to those same taxpayers. The answer is unequivocally, no. This memo asks the City Council to docket a hearing as soon as possible to rescind Resolution R-297335 passed on November 18, 2002.

DISCUSSION

The pertinent paragraphs of Council resolution R-297335 read as follows:

BE IT RESOLVED, by the Council of the City of San Diego that the City shall defend, indemnify and hold harmless all past, present and future members of the Retirement Board against all expenses, judgments, settlements, liability and other amounts actually and reasonably incurred by them in connection with any claim or lawsuit arising from any act or omission in the scope of the performance of their duties as Board Members under the Charter.

The resolution continues:

BE IT FURTHER RESOLVED, that the City shall have no obligation to provide any defense or indemnification under this Resolution to any Board Member who: (1) fails or refuses to cooperate with the City Attorney or such other attorney who may be engaged to represent the Board Member; or (2) refuses to consent to a settlement (a) which does not require the Board Member to make any payment or perform any act; and (b) by which the settling plaintiff(s)/claimant(s) dismiss the Board Member from the complaint (if any) and generally release the Board Member from all liability arising from the acts or omissions which are the subject of the claim or lawsuit.

At issue here is the wrongdoing of certain former SDCERS Board Members. The appellate court held that the City Council "never made any finding of wrongdoing on the board members' part that may have excused the City from its defense obligation." However, this conclusion of the court is inaccurate. To date, multiple prosecutorial agencies, courts and outside consultants hired by the City have found wrongdoing on the part of the indemnitees. The following is a list of the

² Exhibit 10, *Torres et al v City of San Diego*, Court of App case no. D049111 Superior Court case no. GIC852293.

entities that have concluded that the SDCERS Board Members violated conflict of interest laws or engaged in a *quid pro quo* exchange which is a violation of several state laws:

The attorney advising the SDCERS Board;³

The District Attorney of San Diego;⁴

The United States Attorney;⁵

The Securities and Exchange Commission;⁶

The San Diego City Attorney;⁷

A federal judge;⁸

A San Diego Superior Court judge;⁹

The Kroll investigators.¹⁰

All the above have concluded that the SDCERS Board Members demanding indemnity have committed wrongdoing against the City of San Diego. Yet, the Court of Appeals decision holds that the taxpayers of the City of San Diego must pay these individuals attorneys' fees because the City Council "never made any finding of wrongdoing on the board members' part that may have excused the City from its defense obligation."

Although Resolution R-297335 provided some exceptions to protect the City, it did not provide exceptions for situations when it may not be in the City's best interests to provide a defense. For example, California Government Code section 995 sets forth exceptions to a public agency's obligation to provide a defense to employees and former employees. To adequately protect the

³ Exhibit 2, March 5, 2003 letter to SDCERS from Seltzer Caplan *et al.*.

⁴ Exhibit 3, May 17, 2005 press release "District Attorney Files Felony Conflict of Interest Charges Against San Diego City Pension Board Members;" Exhibit 4, Information CD 190930 filed May 17, 2005 in San Diego Superior Court.

⁵ Exhibit 5, Federal indictment, *United States v Saathoff et al.*, 06CR0043BEN.

⁶ Exhibit 6, Securities and Exchange Commission Cease and Desist Order.

⁷ See *People v Grissom* GIC 850246 and *City of San Diego v SDCERS et al.* Case No. GIC841845

⁸ Exhibit 7, excerpt from the ruling of Judge Huff page 4.

⁹ Exhibit 8, excerpt from the ruling of Judge Barton page 13.

¹⁰ Exhibit 9, excerpt from the Report of the Audit Committee (Kroll Report) pages 109-120; investigation authorized by the City Council.

City's interests, it would have been appropriate to include these exceptions in the resolution, that is: when the City determines that: (1) the act or omission was not within the scope of the board member's duties; (2) the board member acted or failed to act because of actual fraud, corruption, or actual malice; (3) the defense of the action by the public entity would create a conflict of interest between the public entity and the board member; (4) an action is brought by the public entity to remove, suspend, or otherwise penalize the board member; or (5) an action or proceeding is brought by the public entity against the board member as an individual and not in his official capacity.

In addition to not providing the above exceptions, the adoption of the resolution in connection with the decision to underfund the pension system is troubling. On the same date the City Council approved resolution R-297335, the City Council approved the agreement between the City of San Diego and SDCERS allowing the City to continue to underfund its contributions to the retirement system, commonly referred to as Manager's Proposal II ("MPII"). Since then, lawsuits have challenged the legality of MPII, including allegations that SDCERS board members and City Councilmembers took actions that violated California Government Code section 1090 and the liability limit law. The legal issues surrounding MPII and the inadequate protections for the City in the resolution providing indemnity lead the City Attorney's Office to recommend rescission of R-297335.

The City Council has the power to rescind R-297335. Specifically, a legislative body may rescind a previous vote and order, if consistent with the law of its creation and its rules, at any time before the rights of third persons have vested. (*Clark v. Patterson*, 68 Cal. App. 3d 329 (1977)). In that case, the court stated:

It seems self-evident that this rule of law merely enunciates what common sense dictates. Legislative bodies, no less than private individuals or commercial entities, require a measure of flexibility in their dealings and transactions. They, acting as representatives of the people, must have the ability to undo what they have done, given compelling circumstances. (*Id.* at 335).

The City Charter provides that all substantive actions of the Council shall be passed by adoption of an ordinance or resolution. (San Diego Charter § 270). Implicit in the power to initiate an action is the power to withdraw. (*Id.* at 339). Accordingly, the City may rescind or modify previous resolutions provided that such action does not affect the vested rights of third persons. Indeed, on May 2, 2006, the City Council passed Resolution R-301414 which repealed R-297335 prospectively. With regard to retroactivity, we do not believe that the rights of past or present board members, to the extent that any exist, will be inappropriately affected by rescission of R-297335.

First, if the resolution is rescinded, the City's decision whether to provide a defense to SDCERS board members would fall under the requirements of California Government Code section 995 and any applicable exceptions thereto. As such, the board members would have the same rights to a defense and indemnification as an employee or former employee of the City, instead of

potentially greater rights under the indemnity resolution. Second, the broad scope of the indemnity provided under the resolution and the questionable circumstances under which it was adopted is contrary to public policy in that it does not provide protections reasonably afforded public agencies.¹¹ For these reasons, we do not believe that rescission of the resolution will substantially affect any rights of past and present board members to a defense or indemnification.

Finally, the Appellate Court incorrectly concluded that the City Attorney did not have the authority to file the two lawsuits which are subject of the *Torres* appeal. The Appellate Court inexplicably made this ruling notwithstanding the fact that authority to file was not at issue in the lawsuit and notwithstanding the fact that a direct representation was made to the Court on the record that the City Attorney did have authority to file both lawsuits. One lawsuit was based upon statutory authority specifically conferred upon any City Attorney to file a Political Reform Act claim in the name of the People, *People v Grissom*, GIC 850246.¹² The other was the cross-complaint in the SDCERS case filed after authorization from the City Council in *City of San Diego v SDCERS et al.* Case No. GIC841845.¹³

CONCLUSION

The City Council approved the resolution indemnifying SDCERS board members at a time when it needed SDCERS' agreement allowing the City to continue to underfund its retirement contributions. The indemnity resolution did not include reasonable protections for the City similar to those authorized under California Government Code section 995. At this point, the City will continue to face demands for indemnification and defense from SDCERS board members. Rescission of the resolution will put board members on the same level as employees and former employees of the City, instead of providing greater protection.

Each of the wrongdoers in the *Torres* case has relied upon Resolution R-297335. To prevent the injustice of these individuals using taxpayer funds to pay their attorneys, it is imperative that the Council rescind the Resolution. Such inequity is contrary to public policy and is not in the best

¹¹ A party may rescind a contract if the public interest will be prejudiced by permitting the contract to stand. Cal. Civ. Code § 1689(b)(6).

¹² The case referred to was *People v Grissom* GIC 850246. The San Diego City Attorney is empowered to bring actions under Government Code §§ 87100, 87200 as a civil prosecutor in the name of the People of the State of California and under Govt. Code § 91001.5, which provides: "In any case in which a district attorney could act as the civil or criminal prosecutor under the provisions of this title, the elected city attorney of any charter city may act as the civil or criminal prosecutor with respect to any violations of this title occurring within the city."

¹³ Cross-complaint *City of San Diego v SDCERS et al.* Case No. GIC841845. This cross-complaint was specifically authorized in closed session by the City Council as acknowledged by Council President Scott Peters this morning, July 30, 2007, in an interview on KUSI TV.

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interests of the City. Accordingly, we recommend that the City Council rescind resolution R-297335.

MICHAEL J. AGUIRRE, City Attorney

A handwritten signature in black ink, appearing to read 'Michael Aguirre', written over the printed name.

MICHAEL J. AGUIRRE
City Attorney